Petition

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

81-481

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO. _____

L. C. BURNAMAN,
Petitioner

v.

LEE SINGLETON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO COURT OF CIVIL APPEALS NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE IS VIOLATED WHEN A STATE COURT AWARDS TREBLE DAMAGES UNDER THE STATE'S CONSUMER PROTECTION STATUTE FOR MISREPRESENTATION IF THERE IS NO FINDING THAT SUCH MISREPRESENTATION WAS WILLFUL AND INTENTIONAL?

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PETITION FOR WRIT OF CERTIORARI TO COURT OF CIVIL APPEALS NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

L. C. Burnaman, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, at Beaumont, Texas, which was entered in this cause on the 5th day of March, 1981.

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals is unreported and is printed in Appendix A, hereto, infra, page A-1. The judgment of the Texas Court of Civil Appeals is printed in Appendix B hereto, infra, page B-1. The judgment of the District Court of Angelina County, Texas, is printed in Appendix C hereto, infra, page C-1. The order of the Texas Supreme Court refusing, no reversible error, Petitioner's application for writ of error is printed in Appendix D, infra, page D-1. The order of the Texas Supreme Court denying Petitioner's motion for rehearing is printed in Appendix E, infra, page E-1.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on the 5th day of March, 1981. A timely motion for rehearing was denied by the Court on March 31, 1981. Thereafter, Petitioner filed an application for writ of error with the Supreme Court of Texas which was refused, no reversible error, on June 3, 1981. A timely motion for rehearing was overruled by the Supreme Court of Texas on June 24, 1981. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the construction and application of the Texas Business and Commerce Code Sec. 17.41, et seq., known as the Deceptive Trade Practices-Consumer Protection Act. The Act in effect at the time of this transaction which governs this case is set out hereinafter.

SEC. 17.46 DECEPTIVE TRADE PRACTICES UNLAWFUL

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(1) passing off goods or services as those of another;

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business;

(18) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer

is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to seller the names of other prospective buyers if recepit of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business and Commerce Code to involve obligations in excess of those which are appropriate to the goods;

(20) selling or offering to sell, either directly or associated with the sale of goods or services, a right of participation in a multi-level distributorship. As used herein, "multi-level distributorship" means a sale plan for the distribution of goods or services in which promises of rebate or payment are made to individuals, conditioned upon those individuals recommending or securing additional individuals to assume positions in the sales operation, and where the rebate or payment is not exclusively conditioned on or in relation to proceeds from the retail sales of goods.

STATEMENT OF THE CASE

The Texas Deceptive Trade Practices-Consumer Protection Act is broken down into two (2) basic provisions which authorize recovery by an aggrieved consumer. First,

Sec. 17.46(a) declares unlawful any false, misleading or deceptive acts or practices in the conduct of any trade or commerce. Secondly, Sec. 17.46(b) contains a "laundry list" of violations for which a consumer may recover. This case was submitted to the jury under Sec. 17.46(b)(12), which states that "false, misleading or deceptive acts or practices" includes "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. The Respondent, Lee Singleton, purchased certain business assets from L. C. Burnaman, Petitioner. Respondent sued Petitioner on the theory that Petitioner misrepresented the sale to him. The jury found in favor of the Respondent by finding that the Petitioner made representations to Respondent that the sale conferred or involved rights, remedies or obligations which it did not have or involve or which are prohibited by law. The trial court rendered judgment for Respondent against Petitioner for damages in the sum of $18,900.00 actual damages and trebled that amount pursuant to the Deceptive Trade Practices-Consumer Protection Act, Sec. 17.50.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE TEXAS COURTS TO ASSESS TREBLE DAMAGES AGAINST PETITIONER FOR THREE (3) TIMES THE ACTUAL DAMAGES SUFFERED BY RESPONDENT WITHOUT A FINDING THAT SUCH MISREPRESENTATION WAS WILLFUL AND INTENTIONAL, VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Texas Deceptive Trade Practices-Consumer Protection Act must be tested by the same standards of due process as penal statutes, because of the provision for treble damages in Sec. 17.50(b)(1). It is the contention of the Petitioner that any exaction of damages over and above that necessary to compensate Respondent for his actual pecuniary loss is punitive in nature. The award of treble damages is a sufficiently severe exaction as to be within the due process requirement applicable to criminal penalties. See *Helwig v. United States,* 188 U.S. 605, 23 S.Ct. 427, 47 L.Ed. 614 (1903). Accordingly, the imposition of the penalty of treble damages provided by Sec. 17.50(b)(1) must meet the same due process requirements as penal statutes.

Subsection (b) contains a "laundry list" of twenty (20) "false, deceptive or misleading acts or practices." Examination of this list reveals that intent to deceive is expressly required in some, but not in others, and thus an uncertainty arises as to whether such intent is required in a particular case. In *Pennington v. Singleton,* 606 S.W.2d 682, the Supreme Court of Texas held that the Deceptive Trade Practices-Consumer Protection Act was not unconstitutionally vague, even though treble damage liability could be imposed under many of its subdivisions without any showing of an intent to deceive or knowledge of the falsity. The "laundry list" of violations in Sec. 17.46 (b) includes only four (4) "acts or practices" under which intent or knowledge is expressly required before a violation of the Act will be found: Subdivisions (9), (10), (13), and (17). Subdivision (12), which is the provision made the basis of this case, does not require an intent to deceive or knowledge of falsity. Such decision by the Supreme Court of Texas would allow treble dam-

ages to be assessed against the Petitioner in this case without a finding of an intent to deceive, since Subdivision (12) does not expressly require an intent to deceive.

That interpretation of the Deceptive Trade Practices-Consumer Protection Act by the Supreme Court of Texas makes the statute unconstitutionally vague and ambiguous, since the statute allows the imposition of treble damages against the Petitioner without a finding of an intent to deceive. Thus, the Act is so vague and ambiguous as to deny due process and violates the principles set forth by the Supreme Court of the United States in *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). In *United States v. National Dairy Products Corp., supra,* the Supreme Court of the United States relied on the requirement of intent or willfulness to uphold, as against due process attacks, statutes which would otherwise be considered impermissibly vague.

In summary, Petitioner contends that the Texas Deceptive Trade Practices-Consumer Protection Act, Sec. 17.46(b)(12), which is the statute made the basis of this case, having been previously construed by the Supreme Court of Texas as authorizing the imposition of treble damages without a finding of an intent to deceive, is a violation of the Due Process Clause as being impermissibly vague, for it does not give fair notice to the Petitioner that the treble damage penalty could be assessed against Petitioner for misrepresentations made innocently and without a wrongful intent. Sec. 17.46(b) of the Act is unconstitutional, because treble damage liability can be imposed under many of its subdivisions without any showing that the Defendant intended to deceive the Plaintiff or knew the falsity of his statements. The absence of

a requirement of knowledge or intent in such a statute that is penal in nature makes it unconstitutionally vague. Therefore, this statute is in violation of the Due Process Clause, for it allows the imposition of the treble damage penalty against a defendant, such as the Petitioner herein, for a misrepresentation which may have been made innocently, in good faith, and without a wrongful intent.

CONCLUSION

For the reasons set forth in this Application, Petitioner prays this petition be granted and writ of certiorari issue to review the decision and judgment of the Texas Court of Civil Appeals, Ninth Supreme Judicial District.

Respectfully submitted,

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APPENDIX A

NO. 8610

L. C. BURNAMAN,
Appellant

v.

LEE SINGLETON,
Appellee

Defendant below appeals from a judgment based upon a jury verdict in a suit proceeding as one under the common law for fraud and under TEX. BUS. & COMM. CODE ANN. §§ 17.41, *et seq.* (Supp. 1980-1981), the Deceptive Trade Practices—Consumer Protection Act, hereinafter "DTPA".

Plaintiff, after extensive negotiations over a period of several months, paid defendant $27,400 for a business in which defendant was then engaged. In return for this sum, paid in the form of a cashier's check, plaintiff received a used truck, which he subsequently sold for $600, and two home-made trailers. In addition, he was told that he had acquired the exclusive right to purchase supplies from a mobile home manufacturing company known in our record as "Vogue". According to plaintiff, defendant represented that large sums of money could be made under this exclusive arrangement.

However, plaintiff soon found out that this exclusive right amounted to a right to engage in commercial bribery with the Vogue purchasing agent wherein, in exchange

for "money under the table," plaintiff could receive a much larger quantity of merchandise than was represented by the Vogue sales slip.[1] Plaintiff testified that he first learned of the unusual relationship between defendant and the purchasing agent when they went to the Vogue plant, purchased several items which appeared on the Vogue sales slip, and found that if he bought one door "and gave him [the Vogue purchasing agent] some money under the table that . . . they would put three or four doors under the pile. If we bought one door knob, we would get six or eight."

Upon learning of the modus operandi of this "exclusive" deal which he had purchased from defendant, plaintiff demanded a return of his money. Upon defendant's refusal to rescind the deal, this suit followed. The jury found that defendant made false representations to plaintiff upon which he relied to his damage in the amount of $40,800. The jury also fixed the amount of attorney's fees for plaintiff's counsel at the several stages of the appeal. The trial court, upon considering the motion for new trial, required a remittitur[2] and entered judgment for plaintiff in the sum of $18,900 actual damages which was trebled under DTPA together with attorney's fees.

Defendant appeals upon two points of error contending that the evidence was legally and factually insufficient to

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1. The witness Moore testified that defendant told him how he was able to make so much money from his operation:

"Q. [D]id Burnaman tell you how he made money out there [at Vogue]?

"A. He said he would go out and buy a little and steal a lot."

2. No one challenges the court's finding that the tangible items received by plaintiff (the truck and trailers, etc.) had a market value of $8,500 which was deducted from plaintiff's cash payment of $27,400.

support the jury's verdict.[3] Our review of the points will be under the standards established in *Martinez v. Delta Brands, Inc.*, 515 S.W.2d 263 (Tex. 1974); and *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

It is readily apparent from our preliminary statement of the case that defendant sold plaintiff a right to participate in an illegal activity, i.e., commercial bribery; and, that plaintiff was duped into buying such right without knowledge of the nature of the relationship between defendant and the Vogue purchasing agent.

Defendant argues that he is entitled to relief in this court because there was no evidence that "anyone else, other than the plaintiff, was able to purchase directly from Vogue after the sale" to plaintiff. From this premise, counsel reasons that plaintiff did not establish the basis of his damage claim.

We do not share in this evaluation of the record. Defendant's own testimony established that such exclusive right was an essential element of the sale and that he sold such right to plaintiff. Only if plaintiff engaged in an illegal act could he receive the benefits defendant had promised. We hold that defendant established, by his own testimony, the elements of an unconscionable trans-

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3. TEX. R. CIV. P. 418(d), effective January 1, 1981, permits the combination of such points of error into a single point raising both contentions "if the record references and the argument under such point sufficiently direct the court's attention to the nature of the complaint made regarding each such issue or finding or legal conclusion based thereon."

The amended rule became effective as to pending cases on January 1, 1981. See *Fisher v. Capp*, 597 S.W.2d 393, 400 (Tex. Civ. App. —Amarillo 1980, writ ref'd n.r.e.).

action condemned by §§ 17.46 and 17.50, *DTPA*.[4] *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980); *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978).

Having reviewed the record under the appropriate standards, we find no error. Consequently, we overrule both points of error and affirm the judgment of the trial court.

Affirmed.

It appearing to the court that the issues involved herein have been settled by clear authority of long standing and present no question or application of any rule of law of interest or importance to the jurisprudence of the State, it is ORDERED, pursuant to TEX. R. CIV. P. 452, that the opinion not be published.

Quentin Keith
Justice

Opinion delivered
March 5, 1981

4. The court's charge, which comes to us without objection, was one designed to submit common law fraud to a jury. We suggest that in a suit under DTPA consideration be given to the submission of the cause under the guidelines laid down in *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978).

APPENDIX B

COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT
Beaumont, Texas 77701

Martin Dies, Jr., Chief Justice — J. A. Hulgan
Quentin Keith, Associate Justice — Clerk
Harold R. Clayton, Associate Justice — (713) 635-8402

Judgment entered March 5th, 1981

L. C. Brenaman

vs. No. 8610

Lee Singleton

Appealed from the District Court of Angelina County

Opinion by Associate Justice Quentin Keith

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellant, L. S. Brenaman and the sureties on his appeal bond, Dan Brazil and Kelly L. Newman. A copy of this judgment, shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

/s/ JOE A. HULGAN
Joe A. Hulgan
Clerk

APPENDIX C

IN THE DISTRICT COURT OF
ANGELINA COUNTY, TEXAS
159th JUDICIAL DISTRICT

NO. 16,633

LEE SINGLETON

v.

L. C. BURNAMAN

REFORMED JUDGMENT AND ORDER

BE IT REMEMBERED that on the 29th day of July, 1980, came on to be heard Defendant's Amended Motion for New Trial in the above entitled and numbered cause, wherein Lee Singleton is Plaintiff and L. C. Burnaman is Defendant; and

Came the parties by and through their attorneys and agreed that the Judgment previously entered by this Court on June 16, 1980 should be incorporated herein as though fully set out verbatim, except as it is specifically reformed herein; and

The Court, and the parties, in agreement, being of the opinion that the allowance of mental anguish in this cause is contrary to the law of this State, hereby reforms the Judgment in this cause and strikes the Jury's finding of $5,000.00 as mental anguish damages; and

Therefore the damages awarded in the Judgment should read as follows:

1. That Plaintiff should have and recover of and from said Defendant the sum and amount of $18,900.00 as actual damages, said sum being arrived at as follows:

(a) The Court hereby finds that under the evidence Plaintiff suffered actual damages in the sum and amount of $18,900.00. This figure is arrived at by the Court's remitting the Jury's finding of $40,800.00 actual damages to a sum of $27,400.00, which amount is the sum of money paid by Plaintiff to Defendant for the transaction in question and the Court hereby finds that Plaintiff did receive a benefit as a result of said transaction and that therefore the $8,500.00 should be offset from the $27,400.00, leaving a net amount of actual damages of $18,900.00. The Court further finds that in accord with the law of the State of Texas, the amount of actual damages sustained by Plaintiff should be trebled resulting in a net actual damage judgment for Plaintiff in the sum and amount of $56,700.00

2. That Plaintiff is entitled to pre-judgment interest from and after May 30, 1976, at the rate of six (6%) per cent per annum, and the Court finds that the pre-judgment interest should be calculated on the sum and amount of the actual damages, i.e., $18,900.00, and that said interest amounts to a sum of $4,588.70 calculated through the date this Judgment was originally entered. This sum is arrived at by using a daily interest factor of $3.10 per day and this sum, when calculated through the date Judgment was originally entered, being the 16th day of June, 1980, amounts to the total interest award in the sum and amount of $4,588.70.

3. It is the further order and judgment of this Court that in accord with the Verdict of the Jury that Plaintiff should have and recover the sum and

amount of $5,000.00 for attorney's fees earned and accrued through the date of this Judgment. In this regard, this Court is reducing the Jury's award of $8,000.00 as attorney's fees to the sum of $5,000.00.

Therefore, the Reformed Judgment is entered for the Plaintiff as follows: the actual damages of $18,900.00 are trebled amounting to a sum of $56,700.00, plus accrued interest on the sum of $18,900.00 being the sum of $4,588.70, together with attorney's fees in the sum and amount of $5,000.00, resulting in a Judgment of this Court in favor of the Plaintiff for the sum and amount of $66,288.70.

It is the further Order and decree of this Court that the Plaintiff is entitled to recovery Judgment interest in the sum and amount of nine (9%) per cent per annum on the sum of $66,288.70 until such sum is paid in full by Defendant to Plaintiff.

It is the further Order and Decree of this Court that the Plaintiff is entitled to recover the further additional attorney's fees if this cause is appealed:

(a) That if this cause is appealed to the Court of Civil Appeals, that Plaintiff is entitled to recover the sum and amount of $750.00 for such appeal; and

(b) That if application is made for writ of error to the Supreme Court of Texas, that Plaintiff is entitled to recover $750.00 in connection with the application for writ of error to the Texas Supreme Court; and

(c) That if the writ of error in the Supreme Court of Texas is granted that Plaintiff is entitled to recover the additional sum and amount of $750.00 in connection therewith.

It is the opinion of this Court that the Jury's award should be and is hereby remitted and/or reduced to conform to the above stated amounts, as the Court believes that justice would be served in accordance with the Judgment entered hereby.

It is the further finding of this Court that execution should issue for the recovery of all sums mentioned in this Judgment.

It is the further finding of this Court that Defendant pay costs of Court, for which let execution issue.

It is the further Order of this Court that Defendant's Motion for New Trial is hereby overruled and that the Judgment entered on June 16, 1980 is hereby reformed.

SIGNED and ENTERED this 1st day of Aug., 1980.

/s/ DAVID WALKER
David Walker, Presiding Judge

APPENDIX D

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

June 3, 1981

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of

No. C-256

BURNAMAN

v.

SINGLETON,

was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX E

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

June 24, 1981

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of

C-256

L. C. BURNAMAN

v.

LEE SINGLETON,

was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

Opposition

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IN THE

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OCTOBER TERM 1981

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v.

LEE SINGLETON,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO COURT OF CIVIL APPEALS NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTION PRESENTED

WHETHER A WRIT OF CERTIORARI SHOULD BE GRANTED WHEN THE ISSUE OF LAW INVOLVED HAS NOT BEEN PRESENTED IN THE LOWER COURTS BY PETITIONER?

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CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment, Due Process Clause 3, 4, 5

TEXAS DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO. 81-481

L. C. BURNAMAN,
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LEE SINGLETON,
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO COURT OF CIVIL APPEALS NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Lee Singleton, the Respondent herein, prays that the Petition for Writ of Certiorari to review the Judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, Texas, which was entered on the 5th day of March, 1981, be in all things denied.

OPINIONS BELOW

Respondent adopts by reference the opinions printed and contained in Petitioner's Application for Writ of Certiorari as though restated verbatim herein.

BRIEFS SUBMITTED BY PETITIONER TO LOWER COURTS

The brief of L. C. Burnaman, Petitioner in this cause, to the Court of Civil Appeals of the Ninth Supreme Judicial District of Texas, Beaumont, Texas, is printed in Appendix A, hereto, infra, page A-1. The brief in support of L. C. Burnaman, Petitioner herein, to the Supreme Court of the State of Texas, for Application for Writ of Error, is attached hereto in Appendix B, infra, page B-1.

JURISDICTION

Respondent does not quarrel with the Statement of Jurisdiction by Petitioner, except to the extent that Petitioner has not properly invoked the jurisdiction of the Supreme Court of the United States because the questions presented by Petitioner to the Supreme Court of the United States in the Application for Writ of Certiorari have not been presented for review and argued before the lower Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has properly stated the constitutional and statutory provisions involved, except as set forth herein.

STATEMENT OF THE CASE

Petitioner has correctly stated the statement of the case.

ARGUMENT OF RESPONDENT

REASONS FOR DENYING THE WRIT

REASON ONE

THE QUESTION THAT IS PRESENTED TO THE HONORABLE SUPREME COURT OF THE UNITED STATES HAS NOT BEEN PROPERLY PRESERVED IN THE LOWER COURTS. SINCE ANY QUESTION PRESENTED TO THE SUPREME COURT OF THE UNITED STATES FOR REVIEW MUST HAVE BEEN BRIEFED IN THE LOWER COURTS AND ARGUED BEFORE SAME, THE APPLICATION OF PETITIONER FOR THE GRANTING OF A WRIT OF CERTIORARI SHOULD BE DENIED.

Petitioner originally appealed the judgment of the 259th Judicial District Court of Angelina County, Texas, to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, Texas. Thereafter, Petitioner appealed such case to the Texas Supreme Court. Petitioner did not raise any constitutional issues, specifically, any alleged violation of the Due Process Clause of the United States Constitution, in either of the lower Courts so mentioned. Thus, the Writ of Certiorari must be denied because the constitutional question has not been properly raised and preserved in the Court below and considered by it.

There are many cases that require any question presented to the Supreme Court for review to have been briefed in the lower Courts and argued before it before same can be properly presented to the Supreme Court of

the United States. *American Fire and Casualty Company v. Finn,* 241 U.S. 6, 71 S. Ct. 534, 95 L.Ed. 702 (1951). Also see *FTC v. Travelers Health Ass'n,* 362 U.S. 293, 298, 80 S. Ct. 717, 4 L.Ed.2d 724 (1960), and *California v. Taylor,* 353 U.S. 553, 556, 77 S. Ct. 1037, I L.Ed.2d 1034 (1957).

Attached hereto and made a part of this record are all of the briefs presented by Petitioner, L. C. Burnaman, in the lower Courts, that is, the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas and the Supreme Court of Texas for the purpose of demonstrating that the questions presented to the Supreme Court of the United States for review by Petitioner in his Application for Writ of Certiorari, were not briefed in the lower Courts, nor argued by Petitioner in the lower Courts. Thus the questions being raised in the Supreme Court of the United States as grounds for the granting of a Writ of Certiorari have not been properly raised and preserved in the Courts below, nor considered by said lower Courts.

ARGUMENT OF RESPONDENT

REASONS FOR DENYING THE WRIT

REASON TWO

THE DECISION OF THE TEXAS COURTS TO ASSESS TREBLE DAMAGES AGAINST PETITIONER FOR THREE TIMES THE ACTUAL DAMAGES SUFFERED BY RESPONDENT WAS NOT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Texas Supreme Court in the case of *Singleton v. Pennington,* 606 S.W.2d 682 (Tex. S.Ct., 1980) is sound

authority that the Texas Business and Commerce Code, Sec. 17.41, et seq, known as the Deceptive Trade Practices—Consumer Protection Act, meets constitutional requirements and is not unconstitutionally vague and indefinite.

SUMMARY OF THE ARGUMENT

In summary, Respondent contends that the application for Writ of Certiorari should be denied because the issues were not properly preserved in the lower Courts, and further contends that in any and all events, the Deceptive Trade Practices—Consumer Protection Act of the State of Texas does not violate the provisions of the Due Process Clause of the United States Constitution.

CONCLUSION

For the reasons set forth in this response, Respondent prays that the Application for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel for Respondent

APPENDIX A

NUMBER 8610

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

L. C. BURNAMAN, APPELLANT

vs.

LEE SINGLETON, APPELLEE

BRIEF FOR APPELLANT

Kelly L. Newman
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NUMBER 8610

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

L. C. BURNAMAN, APPELLANT

vs.

LEE SINGLETON, APPELLEE

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal by the Defendant* from a Judgment rendered on a jury verdict awarding treble damages to the Plaintiff and attorney's fee pursuant to the Deceptive Trade Practices Act.

STATEMENT OF FACTS

In May, 1976, Defendant sold certain assets of his business to Plaintiff. Defendant was in the business of selling parts for camper trailers to owners of such recrea-

* The parties will be designated as they were in the trial court.

tional vehicles. The assets sold consisted of a truck, two trailers, some parts held in inventory and an exclusive right to purchase from a local supplier. (S.F. Page 17, Lines 20-25 and S.F. Page 18, Lines 1-6). Defendant had the exclusive right to purchase parts from a local manufacturer of mobile homes, known as Vogue and later succeeded by Carolina Homes of Texas, and this exclusive right was included in the sale. (S.F. Page 64, Lines 16-25 and S.F. Page 65, Lines 1-15).

The main reason the Plaintiff purchased the business assets from the Defendant was in order to acquire such exclusive right to buy parts from Vague. The Plaintiff paid a price of $27,400.00 for the assets, and testified that he would not have paid such a price if it had not been for the exclusive right. (S.F. Page 20, Lines 22-25). Plaintiff testified that in his opinion the exclusive right was worth $20,000.00 and the other assets were worth approximately $7,500.00. (S.F. Page 20, Lines 14-21).

The Plaintiff alleged that the Defendant misrepresented the sale to him, and the case was submitted to the jury upon special issues of common law fraud and violation of the Deceptive Trade Practices Act. The jury found in favor of the Plaintiff on both theories of recovery.

The Court rendered Judgment for Plaintiff in the sum of $18,900.00 actual damages and then trebled that amount pursuant to the Deceptive Trade Practices Act.

POINT OF ERROR NUMBER ONE

The Trial Court erred in entering Judgment for Plaintiff, because there is no evidence to support the Court's award of $18,900.00 actual damages for the Plaintiff.

POINT OF ERROR NUMBER TWO

The Trial Court erred in entering Judgment for Plaintiff, because there is insufficient evidence to support the Court's award of $18,900.00 actual damages for the Plaintiff.

ARGUMENT AND AUTHORITIES

POINT OF ERROR NUMBER ONE (Restated)

The Trial Court erred in entering Judgment for Plaintiff, because there is no evidence to support the Court's award of $18,900.00 actual damages for the Plaintiff.

POINT OF ERROR NUMBER TWO (Restated)

The Trial Court erred in entering Judgment for Plaintiff, because there is insufficient evidence to support the Court's award of $18,900.00 actual damages for the Plaintiff.

Point Of Error Number One and Point Of Error Number Two will be argued together since they involve a common thread of law and fact and logically fit together.

Plaintiff tried this law suit and submitted it to the jury under the theory that the Defendant misrepresented the sale of certain business assets to the Plaintiff. The Plaintiff paid $27,400.00 for such assets, which included an exclusive right to purchase parts from Vogue, and the Plainitff placed a value of $20,000.00 on that exclusive right.

The Trial Court committed error in awarding actual damages of $18,900.00. The Trial Court found that the

actual damages amounted to $27,400.00 (the purchase price) and deducted $8,500.00 which the Court found was the benefit received by the Plaintiff for the value of the property actually received. However, the Court should have given the Defendant credit for the $20,-000.00 value of the exclusive right, because there is no evidence that the Plaintiff did not receive the exclusive right to purchase from Vogue. There is no testimony in the record to show that anyone else, other than the Plaintiff, was able to purchase directly from Vogue after the sale was consummated. In the alternative, the evidence is insufficient to show that anyone else was able to purchase directly from Vogue after the sale was consummated. Consequently, the Court should have given the Defendant a credit of $20,000.00 against the damages awarded to Plaintiff, because the Plaintiff received an exclusive right which he himself valued at $20,000.00. The Court gave the Defendant credit for $8,500.000 worth of property received by the Plaintiff but erred in not giving the Defendant credit for the $20,000.00 exclusive right received by Plaintiff.

Defendant was entitled to a credit in that amount as an offset against the damages awarded to Plaintiff, since the Plaintiff failed to prove that he did not receive the exclusive right, and the burden of proving such was on the Plaintiff. Although the Defendant did not plead nor submit an issue to the jury regarding an offset, the issue was tried by consent, since the Plaintiff did not object. V.T.R.A. Civ. Proc. Rule 67. Medical Personnel Pool of Dallas, Inc. v. Seale, 554 S.W.2d 211 (Civ. App. 1977, ref. n.r.e.). Gregory v. Tyler Grain & Storage Co., 341 S.W.2d 221 (Civ. App. 1961, No Writ History). The

Judgment, therefore, is in error since it did not give the Defendant credit for the $20,000.00 exclusive right received by the Plaintiff.

PRAYER

Appellant respectfully prays that the Court reverse this cause and remand for a new trial, or, in the alternative, that the Court render such Judgment as should have been rendered in the Trial Court.

Respectfully submitted,

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Dan Brazil
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing brief for Appellant has been delivered to George Chandler, P. O. Box 340, Lufkin, Texas 75901, attorney for Appellee.

/s/ KELLY L. NEWMAN
Kelly L. Newman

APPENDIX B

NO. _____

IN THE
SUPREME COURT OF TEXAS

L. C. BURNAMAN,
PETITIONER

VS.

LEE SINGLETON,
RESPONDENT

APPLICATION FOR WRIT OF ERROR

Kelly L. Newman
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Dan Brazil
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Attorneys for Petitioner,
L. C. Burnaman

B-2

NO. _____

IN THE
SUPREME COURT OF TEXAS

L. C. BURNAMAN,
PETITIONER

vs.

LEE SINGLETON,
RESPONDENT

APPLICATION FOR WRIT OF ERROR

To The Honorable Supreme Court Of Texas

Petitioner, L. C. Burnaman, sues for a writ of Error issued to the Honorable Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont in order to have reviewed the Judgment of that Court with respect to the errors hereinafter indicated and in support of this application would respectfully show:

STATEMENT OF THE NATURE OF THE CASE

Petitioner, L. C. Burnaman, prosecutes this Application for Writ of Error from the Judgment of the Court

of Civil Appeals which affirms the Judgment of the Trial Court that Respondent recover damages against Petitioner. This is a suit for misrepresentation in connection with the sale of certain business assets by L. C. Burnaman to Lee Singleton. The jury found in favor of the Respondent, Lee Singleton. The Trial Court rendered Judgment for Respondent in the sum of $18,900.00 actual damages and then trebled that amount pursuant to the Deceptive Trade Practices Act. The Court of Civil Appeals affirmed the Judgment of the Trial Court.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Sec. 6 of Tex. Rev. Civ. Stat. Ann., Art. 1728.

POINTS OF ERROR

FIRST POINT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE EVIDENCE ESTABLISHES THAT RESPONDENT DID NOT RECEIVE THE EXCLUSIVE RIGHT WHICH HE PURCHASED FROM PETITIONER.

SECOND POINT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN UPHOLDING THE AMOUNT OF DAMAGES AWARDED BY THE TRIAL COURT, SINCE THE EVIDENCE FAILED TO ESTABLISH THAT RESPONDENT DID NOT RECEIVE THE EXCLUSIVE RIGHT HE PURCHASED FROM PETITIONER.

The Respondent, Lee Singleton, purchased certain business assets from L. C. Burnaman, Petitioner. Respondent sued Petitioner on the theory that the Petitioner misrepresented the sale to him. The case was submitted to the jury upon special issues of common law fraud and violation of the Deceptive Trade Practices Act. The jury found in favor of the Respondent on both theories of recovery, and the Trial Court rendered Judgment for Respondent against Petitioner for damages in the sum of $18,900.00 actual damages trebled pursuant to the Deceptive Trade Practices Act. The Court of Civil Appeals affirmed the Judgment of the Trial Court. The Court of Civil Appeals held that the evidence was legally and factually sufficient to support the verdict of the jury. It is the contention of Petitioner that the Court of Civil Appeals erred in holding that the evidence was sufficient to support the verdict of the jury and the amount of damages awarded by the Trial Court.

The Respondent paid $27,400.00 for certain business assets, which included an exclusive right to purchase parts from Vogue, and the Respondent placed a value of $20,000.00 on that exclusive right.

The Trial Court found that the actual damages amounted to $27,400.00 (the purchase price) and deducted $8,500.00 which the Count found was the benefit received by the Respondent for the value of the property actually received. However, the Court should have given the Petitioner credit for the $20,000.00 value of the exclusive right, because there is no evidence that the Respondent did not receive the exclusive right to purchase from Vogue. There is no testimony in the record to show

that anyone else, other than Respondent, was able to purchase directly from Vogue after the sale was consummated.

Consequently, the Court should have given the Petitioner a credit of $20,000.00 against the damages awarded to Respondent, because the Respondent received an exclusive right which he himself valued at $20,000.00. The Trial Court gave the Petitioner credit for $8,500.00 worth of property received by the Respondent but erred in not giving the Petitioner credit for the $20,000.00 exclusive right received by Respondent.

Petitioner was entitled to a credit in that amount as an offset against the damages awarded to Respondent since the Respondent failed to prove that he did not receive the exclusive right, and the burden of proving such was on the Respondent, who was the Plaintiff in the Trial Court. By affirming the Judgment of the Trial Court, the Court of Civil Appeals erred.

PRAYER

Petitioner respectfully prays the Court to reverse the Court of Civil Appeals; or, alternatively, remand this cause to the Trial Court for a new trial in the interest of justice, and for such further relief as the Petitioner may be entitled.

Respectfully submitted,

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Attorneys for Petitioner,
L. C. Burnaman

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Application For Writ Of Error has been delivered to the attorney for Respondent, George Chandler, P. O. Box 340, Lufkin, Texas.

/s/ KELLY L. NEWMAN
Kelly L. Newman

APPENDIX C

MOTION FOR NEW TRIAL

FILED: JUNE 20, 1980

NO. 16,633

IN THE DISTRICT COURT
IN AND FOR
ANGELINA COUNTY, TEXAS

LEE SINGLETON

vs.

L. C. BURNAMAN

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant, L. C. Burnaman, in the above numbered and entitled cause, and files this motion for a new trial, and as grounds for said motion would respectfully show unto the Court the following:

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I.

The evidence is insufficient to support the verdict of the Jury.

II.

The verdict of the Jury is contrary to the evidence.

WHEREFORE, premises considered, Defendant prays that the Court grant this motion, set aside the verdict of the Jury and grant a new trial in order that justice and equity may be done.

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KELLY L. NEWMAN
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By: /s/ KELLY L. NEWMAN
Attorneys for Defendant

C-3

AMENDED MOTION FOR NEW TRIAL

FILED: JULY 10, 1980

NO. 16,633

IN THE DISTRICT COURT
IN AND FOR
ANGELINA COUNTY, TEXAS

LEE SINGLETON

VS.

L. C. BURNAMAN

AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant, L. C. Burnaman, in the above numbered and entitled cause, and files this Motion For New Trial, and as grounds for said motion would respectfully show unto the Court the following:

I.

The judgment is based in part upon a jury finding of common law fraud by the Defendant; however, there are

no pleadings, no evidence or jury findings of an intent to defraud or deceive on the part of the Defendant.

II.

The judgment of the Court awards actual damages in the amount of $18,900.00, but that amount is not supported by the evidence.

III.

The judgment awards $5,000.00 damages for mental anguish, which is contrary to the law since there was no finding of willful tort, gross negligence or mental anguish causing physical injury.

IV.

The judgment awards the sum of $5,000.00 damages for mental anguish, but the award of damages for mental anguish is not supported by the evidence.

V.

The judgment awards treble damages in favor of the Plaintiff and against the Defendant, but such award of treble damages is unconstitutional since there was no finding that the alleged misrepresentation was willful or intentional.

WHEREFORE, premises considered, Defendant prays that the Court grant this motion, set aside the verdict of

the jury and grant a new trial in order that justice and equity may be done.

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By: /s/ KELLY L. NEWMAN
Attorneys for Defendant

APPENDIX D

NUMBER 8610

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

L. C. BURNAMAN,
APPELLANT

vs.

LEE SINGLETON,
APPELLEE

MOTION FOR REHEARING FOR APPELLANT

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D-2

NUMBER 8610

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

L. C. BURNAMAN,
APPELLANT

vs.

LEE SINGLETON,
APPELLEE

MOTION FOR REHEARING FOR APPELLANT

TO THE HONORABLE COURT OF CIVIL APPEALS:

Appellant, L. C. Burnaman, Defendant in Cause No. 16,633-77-2 in the 159th District Court of Angelina County, respectfully submits his motion for rehearing in response to the opinion of the Court rendered March 5, 1981, and requests that the Court consider his assignments of error. As in prior briefs, the parties will be referred to by name or as they appeared in the District Court.

ASSIGNMENTS OF ERROR

ASSIGNMENT 1. The Court of Civil Appeals erred in holding that the Defendant sold Plaintiff a right to participate in an illegal activity and that Plaintiff was duped into buying such right without knowledge of the nature of Defendant's business.

ASSIGNMENT 2. The Court of Civil Appeals erred in holding that the evidence establishes that Plaintiff did not receive the exclusive right which he purchased from Defendant.

ASSIGNMENT 3. The Court of Civil Appeals erred in upholding the amount of damages awarded by the Trial Court, since the evidence was legally and factually insufficient to establish that Plaintiff did not receive the exclusive right he purchased from Defendant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Court of Civil Appeals should grant the motion for rehearing and should reverse the judgment of the 159th District Court of Angelina County and render the

proper judgment; or, in the alternative, remand this case to the Trial Court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been delivered to the attorney for Appellee, George Chandler, P. O. Box 340, Lufkin, Texas.

/s/ KELLY L. NEWMAN
Kelly L. Newman

APPENDIX E

NUMBER C-256

IN THE
SUPREME COURT OF TEXAS

L. C. BURNAMAN,
PETITIONER

vs.

LEE SINGLETON,
RESPONDENT

MOTION FOR REHEARING FOR PETITIONER

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Dan Brazil
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Lufkin, Texas 75901

Attorneys for Petitioner

E-2

NUMBER C-256

IN THE
SUPREME COURT OF TEXAS

L. C. BURNAMAN,
PETITIONER

vs.

LEE SINGLETON,
RESPONDENT

MOTION FOR REHEARING FOR PETITIONER

To The Honorable Supreme Court Of Texas:

Petitioner, L. C. Burnaman, Defendant in Cause Number 16,633-77-2 in the 159th District Court of Angelina County, respectfully submits his motion for rehearing in response to denial of Petitioner's Application For Writ Of Error on June 3, 1981, and requests that the Court consider his points of error.

POINTS OF ERROR

POINT NO. 1

The Court of Civil Appeals erred in holding that the evidence establishes that Respondent did not receive the

exclusive right which he purchased from Petitioner. There is no evidence to establish such finding by the Court.

POINT NO. 2

The Court of Civil Appeals erred in upholding the amount of damages awarded by the Trial Court, since the evidence failed to establish that Respondent did not receive the exclusive right he purchased from Petitioner. There is no evidence to establish such finding by the Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Supreme Court of Texas should grant the motion for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy hereof has been delivered to the attorney for Respondent, George Chandler, P. O. Box 340, Lufkin, Texas 75901.

/s/ KELLY L. NEWMAN
Kelly L. Newman